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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MARTINEZ, Defendant and Appellant.	A151345 (Contra Costa County Super. Ct. No. 5-161801-6)

Raymond Martinez was convicted of sexually abusing his stepdaughter. He argues the prosecutor committed misconduct during voir dire and the trial court improperly imposed separate sentences for two misdemeanor convictions. He also asks for an in camera review of the victim's mental health records that the trial court did not disclose to the defense. We find no merit in Martinez's claims but remand for sentencing corrections that do not affect his aggregate term of imprisonment.

BACKGROUND

Martinez sexually molested his stepdaughter, Jane Doe, starting when she was 14 and continuing into her college years.

A jury found Martinez guilty of 15 counts of lewd conduct on a child 14 or 15 years old and at least 10 years younger than the defendant (Pen. Code, § 288, subd. (c)(1)),[1] two counts of sexual penetration by a foreign object on a child under 18 (§ 289, subd. (h)), two counts of oral copulation of a child under 18 (former § 288a,

[1] Undesignated statutory references are to the Penal Code.

subd. (b)(1) [repealed and reenacted as § 287, subd. (b)(1) without substantive change by Stats. 2018, ch. 423, § 49, eff. Jan. 1, 2019]; misdemeanor sexual battery (§ 243.4, subd. (e)(1)), and misdemeanor child molestation (§ 647.6, subd. (a)(1)).

The court sentenced Martinez to the three-year aggravated term on one lewd conduct count; consecutive eight-month terms (one-third the midterm) on the other 14 lewd conduct counts; concurrent eight-month terms on the sexual penetration and oral copulation counts; and concurrent one-year terms on the misdemeanor counts, for a total sentence of 12 years four months.

DISCUSSION

A.

Martinez argues the prosecutor committed prejudicial error in voir dire. We conclude the trial court cured any error.

1.

The prosecutor began voir dire by discussing various legal concepts, including the single witness testimony rule: "the testimony of a single witness, if you believe that witness, is enough to prove any fact. [¶] . . . [¶] That means . . . if you believe that witness beyond a reasonable doubt, that fact is proven. There is no other corroboration required." She spoke for five and one-half pages of reporter's transcript without asking any questions. After the court interrupted proceedings for a sidebar, which was not recorded, the prosecutor started questioning potential jurors about the single witness rule.

A prospective juror questioned whether a victim's testimony alone would be sufficient, and the prosecutor said, "But I am going to tell you, that in a sexual assault case . . . ," at which point defense counsel objected. The court asked the prosecutor to complete her question, and she spoke about single witness testimony in a sexual assault case for a full page of transcript. Defense counsel renewed her objection, which the court sustained, telling the prosecutor, "Ask questions. Stop arguing."

After more prospective jurors expressed doubt about relying solely on a victim's testimony, the prosecutor spoke for one-half page of transcript about the frequent absence of DNA and other physical evidence in real criminal cases. The court interrupted the

proceedings for another (unrecorded) sidebar. The prosecutor then asked individual jurors about the single witness rule. The court again interrupted and instructed the jury on the single witness rule, stating the instruction requires jurors to "carefully review all the evidence upon which the proof of that fact depends" before accepting the testimony as proof of the fact: "that relates to the entirety of the testimony of a witness and whether you believe one witness versus another. [¶] . . . [¶] . . . So what's being expressed by the jurors about, 'I would want to review all the evidence,' is completely accurate and appropriate." After another sidebar, the prosecutor questioned individual jurors.

The court later made a record of its concerns about the prosecutor's voir dire. By speaking for a long time without asking questions, the prosecutor engaged in "pure argument[, which] is not allowable in voir dire," and she mischaracterized the single witness rule. "[T]he jurors [may] find the complaining witness to be completely believable and credible, but . . . find the other witness to be equally credible and believable. [¶] . . . [¶] . . . In which case, the jury would have a duty to vote not guilty. [¶] . . . [¶] So, I found the way that you were framing the question to be incomplete." The court clarified, however, that its main concern was the "pure argument and indoctrination" in her voir dire. When the prosecutor asked if she had improved, the court said, "[O]h, yeah, yeah, yeah . . . . I had no problem after."

After the jurors were sworn and prior to the presentation of evidence, the court instructed the jury that it "must determine the facts from the evidence received at trial," "must apply the law that [the court] state[s] to you to the facts as you determine them," and "must accept and follow the law as [the court] state[s] it to you regardless of whether you agree with it. If anything concerning the law is said by the attorneys in their arguments or at any other time during the trial that conflicts with my instructions on the law, [you] must follow my instructions." The court further clarified that "statements made by the attorneys during the trial are not evidence." It again gave the jurors the single witness instruction.

2.

" '[E]xamination of prospective jurors should not be used " 'to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.' " ' " (*People v. Abilez* (2007) 41 Cal.4th 472, 492–493.) However, " ' "the adequacy of voir dire is not easily subject to appellate review," ' " and "[u]nless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal." (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

If there was any error, the trial court cured it. The court sustained the only full objection made by Martinez; repeatedly interrupted voir dire to redirect the prosecutor; chastised the prosecutor in open court for arguing rather than asking questions; intervened to clarify the single witness rule; and later stated on the record the prosecutor had stopped arguing during voir dire. The court also instructed empaneled jurors on the applicable law and specifically told them to follow the court's instructions on the law, not counsels' arguments. "We presume that jurors follow the instructions provided by the court in the absence of a showing to the contrary." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 821.) There was no prejudicial error.

B.

Martinez asks for an in camera review of Doe's psychotherapy records, and the People agree review is appropriate. The trial court reviewed the records, disclosed some, and withheld others. Having reviewed the records, we conclude that the trial court did not err. None of the undisclosed records contain new, material information relevant to Doe's credibility. (See *People v. Hammon* (1997) 15 Cal.4th 1117, 1127 [at trial, patient-psychotherapist privilege may yield to defendant's right to impeach witness]; Cal. Const., art. I, § 28, subd. (b)(4) [victims' right not to disclose confidential communications made in the course of counseling].)

C.

Martinez argues section 654 prohibited imposition of separate concurrent sentences for the misdemeanor child molestation (count 19) and sexual battery (count 18). (See *People v. Jones* (2012) 54 Cal.4th 350, 353 [concurrent sentence constitutes punishment for purposes of section 654].) Both convictions arise from an incident in a car when Martinez pulled a vibrator out of a box and said he wanted Doe to use it, then turned it on and placed it between her legs. We address Martinez's claim on the merits even though he did not raise it in the trial court. (See *People v. Hester* (2000) 22 Cal.4th 290, 295.) The trial court did not err.

Section 654 prohibits punishment of the same act or omission under more than one provision of the Penal Code. "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. [Citation.] . . . [¶] [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct." (*People v. Perez* (1979) 23 Cal.3d 545, 551, fn. omitted.)

As applied to multiple sex offenses in a single incident, "sexual gratification" is not the relevant objective: relying on that objective would be "much too broad and amorphous . . . [and] would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez, supra,* 23 Cal.3d at p. 552; see *People v. Harrison* (1989) 48 Cal.3d 321, 336 ["*Perez* . . . is the touchstone in determining how these general principles are to be applied to sex offenses"].) Even when a lewd act does not qualify as a sex crime under another statute, "[e]ach individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation." (*People v. Scott* (1994) 9 Cal.4th 331, 346–347; see *id.* at pp. 336, 344.) In light of the special protection afforded underage victims, "a more lenient rule of conviction should not apply simply because more than one lewd act

occurs on a single occasion." (*Id.* at p. 347; *People v. Jimenez* (2002) 99 Cal.App.4th 450, 452, 455–456 [upholding multiple § 288 convictions based on fondling different parts of minor's body in a single incident].)

When punishment was imposed for two or more acts in a single course of conduct, we may infer the trial court found the defendant acted with independent objectives. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378–1379.) We review the trial court's decision under the substantial evidence standard. (*Id.* at p. 1378; *People v. Harrison, supra,* 48 Cal.3d at p. 335.)

Substantial evidence supports the trial court's implied finding that Martinez acted with a criminal objective in showing Doe the vibrator and asking her to use it (misdemeanor child molesting; count 19) that was independent of his objective in placing the vibrator between her legs (misdemeanor sexual battery; count 18). While the jury necessarily found each act had a sexual motive (see *People v. Phillips* (2010) 188 Cal.App.4th 1383, 1396; § 243.4, subd. (e)(1)), the evidence supports an inference that Martinez's first objective was to use his authority over Doe to induce her to engage in self-stimulating sexual conduct, and his second objective was to make direct sexual contact with Doe.

D.

Finally, we note two sentencing errors. First, the court erroneously imposed a one-year concurrent term for misdemeanor sexual battery (count 18); the maximum sentence is six months. (§ 243.4, subd. (e)(1).) We have a duty to correct the error even though defendant has not raised it. (*People v. Scott, supra,* 9 Cal.4th at p. 354.) We shall direct the trial court to change the concurrent term for misdemeanor sexual battery from one year to six months.

Second, the court erred in determining the length of Martinez's concurrent sentences on the felony counts as one-third the middle terms. " 'Because concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a), they are imposed at the full base term, not according to the one-third middle term formula . . . .' " (*People v. Thompson* (2009) 177 Cal.App.4th

1424, 1432, disapproved on another ground by *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.) Accordingly, we vacate the unauthorized sentences on counts 8, 12, 20, and 21, and remand the matter for the trial court to choose the mitigated, middle, or aggravated terms as concurrent sentences on those counts and amend the abstract of judgment accordingly.

DISPOSITION

We remand to the trial court with directions to impose full mitigated, middle, or aggravated concurrent terms for counts 8, 12, 20, and 21, and a six-month rather than a one-year concurrent term for count 18. The abstract of judgment shall be amended accordingly, and a copy shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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BURNS, J.

WE CONCUR:

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JONES, P. J.

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NEEDHAM, J.